SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Reasons Why the Writ Should Not Be Granted	4
(a) Congressional Intent Cannot Be Determined by Resort to an Ex Post Facto Statement of a Former Member of the House of Representatives	6
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases	Page
Greenberg v. The Equitable Life Assur. Society of the United States, 34 Cal. App. 3d 994, 110 Cal. Rptr. 470 (1973)	3, 6
Multidistrict Vehicle Air Pollution M.D.L. No. 31, In re, 481 F. 2d 122 (9th Cir. 1973), cert. denied sub nom. Morgan v. Automobile Mfrs. Assn. Inc., 414 U.S. 1045 (1973)	9, 10
SEC v. National Securities, 393 U.S. 453 (1969)	4
Transnational Insurance Company v. Rosenlund, 261 F. Supp. 12 (D. Ore. 1966)	8
United States v. O'Brien, 391 U.S. 367 (1968)	8
United States v. United Mine Workers of America, 330 U.S. 258 (1947)	8
Woodwork Manufacturers Asso. v. NLRB, 386 U.S. 612 (1967)	8
Miscellaneous	
91 Congressional Record (79th Congress, 1st Session), p. 1087	7
Rules	
Supreme Court Rules, Rule 19	4, 6
Statutes	
California Insurance Code, Secs. 770-776	2
California Insurance Code, Secs. 790-790.10	2
McCarran-Ferguson Act, United States Code, Title 15, Sec. 1012	2
McCarran-Ferguson Act, United States Code, Title 15, Secs. 1012-1013(b)	1

Page

McCarran-Ferguson Act, United States Code, Title 15, Sec. 1013(b) 2

McCarran-Ferguson Act, United States Code, Title 28, Sec. 1254(1) 1

United States Code, Title 15, Sec. 1 .....1, 2

United States Code, Title 15, Sec. 2 .....1, 2

United States Code, Title 15, Sec. 14 .....1, 2

United States Code, Title 15, Sec. 15 .....1, 2

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-788

RICHARD ADDRISI,

Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit and the order of the United States District Court for the Central District of California are correctly referred to under the heading "OPINIONS BELOW" at page 2 the Petition for a Writ of Certiorari to the States' Court of Appeals for the Ninth Circuit (hereinafter "Petition").

Jurisdiction.

It is conceded that in a proper case jurisdiction of this Court may be invoked under 28 U.S.C. § 1254(1). However, it is submitted that jurisdiction does not exist here for the reason that the McCarran-Ferguson Act, 15 U.S.C. §§ 1012-1013(b), does not permit the petitioner to obtain redress under the Sherman and Clayton Acts, 15 U.S.C. §§ 1, 2, 14 and 15.

Questions Presented.

(a) Was the business of insurance of respondent regulated by the State of California within the meaning of 15 U.S.C. § 1013(b) (McCarran-Ferguson Act)?

(b) Was respondent's assertedly economic coercion an "act of . . . coercion" within the meaning of 15 U.S.C. § 1013(b) (McCarran-Ferguson Act)?

Statutes Involved.

15 U.S.C. § 1012 (McCarran-Ferguson Act);

15 U.S.C. § 1013(b) (McCarran-Ferguson Act);

15 U.S.C. §§ 1, 2, 14 and 15;

Insurance Code of the State of California §§ 790-790.10, inclusive;

Insurance Code of the State of California §§ 770-776.

Statement of the Case.

Petitioner by his complaint sought treble damages from respondent for asserted violations of 15 U.S.C. §§ 14 and 15 for allegedly requiring petitioner to purchase a Whole Life policy which was assigned to petitioner as collateral to secure a loan made by respondent to petitioner secured by deed of trust upon his residence.

It is claimed in petitioner's complaint that the cost of a Whole Life policy was higher than that of term insurance. The thrust of plaintiff's complaint is that petitioner allegedly was coerced into purchasing a Whole Life policy, rather than a term policy, as collateral for the loan made by respondent. The difference in cost between the two types of policies and, consequently, the actual asserted damage to petitioner, assuming the

allegations of his complaint to be true, was approximately $864.00.

The attorneys for petitioner, prior to the filing on March 7, 1972, of the complaint in the United States District Court, which was the subject of the Order of Dismissal (Appendix B of Petition, p. 29), had filed on November 12, 1971, in behalf of David Greenberg a class action for redress against respondent in the Superior Court of the State of California, for the County of Los Angeles, for the same type of asserted wrong as claimed by petitioner herein. As stated in the opinion of the Court of Appeals for the Ninth Circuit (Petition, p. 20), the petitioner's allegations against respondent are substantially identical to the allegations contained in the proposed Second Amended Complaint dealt with by the California Court of Appeal for the Second District in *Greenberg v. The Equitable Life Assur. Society of the United States,* 34 Cal. App. 3d 994, 110 Cal. Rptr. 470 (1973).

The California Insurance Code, as is apparent from the *Greenberg* decision by the California State Court of Appeal, governs the relation between an insurance company and its policyholder. If the *Greenberg* case is certified by the Superior Court of the State of California as a class action petitioner would be a member of that class. Hence, redress for petitioner's request for claimed grievance will be accorded him in the *Greenberg* action if it is successfully prosecuted. Petitioner has not opted out of the *Greenberg* action. Petitioner may also choose to pursue an independent action against respondent in the California courts for redress for the claimed invasion of his rights as alleged in the complaint filed by him in the United States District Court, for the Central District of California.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

The only part of Supreme Court Rule 19 which petitioner has invoked, and that somewhat obliquely, is that portion of 1(b) of the cited rule providing that a Court of Appeals has decided an important question of federal law which has not been but should be settled by this court.

While this court has not settled by way of direct holding the applicability of the McCarran-Ferguson Act in a matter such as that *sub judice*, it has by dictum defined that the "business of insurance", as used in the McCarran-Ferguson Act, is, among other things, the relationship between insurer and insured.

In *SEC v. National Securities*, 393 U.S. 453 (1969), the Securities and Exchange Commission sought to attack a contemplated merger between two insurance companies. The defense of the McCarran-Ferguson Act was rejected by this court. However, the court defined "business of insurance", as used in the McCarran-Ferguson Act, as follows (p. 460):

> "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.' "

What is presented for review by petitioner, to wit, the relationship between petitioner Addrisi and respondent Equitable, is the relationship between insurer and insured, which relationship was stated by this court to be the business of insurance subject to control by laws enacted by various states for the purpose of regulating the business of insurance.

California has enacted a comprehensive plan for the regulation of the business of insurance, including the acts complained of by petitioner. The provisions of the Insurance Code of the State of California are noted under the heading "STATUTES INVOLVED", page 2, *supra*. Particular reference is made to the following provisions of the Insurance Code of the State of California:

> **"§ 790. Purpose of article; regulation of trade practices in insurance business**
>
> The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, Seventy-ninth Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined."
>
> * * *
>
> **"§ 790.02 Engaging in trade practice defined as unfair method of competition prohibited**
>
> No person shall engage in this State in any trade practice which is defined in this article as, or determined pursuant to this article to be, an

unfair method of competition or an unfair or deceptive act or practice in the business of insurance."

"§ 790.03 Prohibited acts

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.

* * *

(c) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance."

California has provided petitioner with an adequate remedy which is abundantly evident by reading the opinion in *Greenberg v. The Equitable Life Assur. Society of the United States,* 34 Cal. App. 3d 994, 110 Cal. Rptr. 470 (1973).

The fact that petitioner has an adequate remedy under state law for the alleged wrongful conduct of respondent negates the existence of an important question of federal law which should be settled by this court (Supreme Court Rule 19).

(a) Congressional Intent Cannot Be Determined by Resort to an Ex Post Facto Statement of a Former Member of the House of Representatives.

Petitioner in Appendix C of his petition, pages 32 through 45, has quoted from the Congressional Record—Extensions of Remarks. The quoted material consists of a letter from former Congressman, Emanuel Celler, to and solicited by George D. Donnahoe, Esq.,

one of petitioner's attorneys, on the letterhead of Mr. Celler's lawfirm. Also, as a part of Appendix C is a memorandum which Mr. Celler states in his letter to Mr. Donnahoe of November 15, 1974, which purports to set forth the entire legislative history of the McCarren-Ferguson Act (sic). The material authored by Mr. Celler was inserted in the Congressional Record on November 25, 1974. The debate on the McCarran-Ferguson Act took place in 1945 (91 Congressional Record, p. 1087, (79th Congress, 1st Session). Personal views of former legislators cannot serve as guidelines with respect to congressional intent after passage of the act in question.

Precisely in point is a very recent decision of this court, Regional Rail Reorganization Act Cases (Nos. 74-165, 74-166, 74-167, and 74-168) decided on December 16, 1974. There Mr. Justice Brennan, speaking for the court, stated the following:

> "Finally, reliance is put upon what is referred to as 'subsequent legislative history' in the form of statements by Congressmen during Oversight Hearings of the House Subcommittee on Transportation and Aeronautics on June 14, 1974, and on an *amicus* brief filed in this Court on behalf of 38 Congressman. ***But post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage.*** See, e.g., *United States v. United Mine Workers of America,* 330 U.S. 258, 282 (1947). Such statements 'represent only the personal views of these legislators, since the statements were . . . [made] after passage of the Act.' " (Emphasis added).

Similar holdings are:

Woodwork Manufacturers Asso. v. NLRB, 386 U.S. 612, 639 (1967);

United States v. United Mine Workers of America, 330 U.S. 258, 281-282 (1947);

See *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968).

In *Transnational Insurance Company v. Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966), a respected jurist, now Senior Circuit Judge Kilkenny of the Court of Appeals for the Ninth Circuit, correctly interpreted the remarks made when Congress was enacting the McCarran-Ferguson Act. Judge Kilkenny's statements bear repeating, pages 26-27:

"Although Section 3(b) of the McCarran-Ferguson Act reserves jurisdiction in the federal system under the Sherman Anti-Trust Act, where there is an agreement to boycott, coerce or intimidate, or where there is an act of boycott, coercion or intimidation, I find nothing in the record before me pointing to a violation by Foremost of the boycott, coercion or intimidation provisions of the later act.

"It would seem that the Congress when enacting the McCarran-Ferguson Act, was concerned with an activity which is not here indicated. The legislative history shows that the boycott, coercion and intimidation exception, was placed in the legislation to protect insurance agents from the issuance by insurance companies of a 'black-list', which would name companies or agents which were beyond the *pale*. This list, in effect, was a directive to an agent not to write insurance in the

name of or for the black-listed company; otherwise, he would be stripped of his agency and not permitted to write insurance for any of the members of the governing organization of insurance companies."

"1. 91 Congressional Record, p. 1087 (79th Congress, 1st Session)."

* * *

"Since the Congressional intent and purpose behind the passage of the McCarran-Ferguson Act was to throw the whole weight of its vast power behind existing and future state systems for regulating and taxing the business of insurance, Prudential Ins. Co. of America v. Benjamin, 328 U.S. 408, 429, 66 S. Ct. 1142, 90 L. Ed. 1342 (1946), it is the Court's duty to liberally construe the 1947 enactments and, if possible, give them a construction as to place Oregon and Washington legislation within the exemption under the Act." (p. 28).

Parenthetically, it should be noted that petitioner's observations at page 11 of the Petition, to the effect that the United States Court of Appeals for the Ninth Circuit has "slammed the federal door shut" on two types of plaintiffs *i.e.*, certain plaintiffs in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F. 2d 122 (9th Cir. 1973), cert. denied *sub nom. Morgan v. Automobile Mfrs. Assn. Inc.*, 414 U.S. 1045 (1973) and the present petitioner are wholly inappropriate.

As has often been said, the Federal courts are forums of limited jurisdiction. Petitioner's rather harsh criticism of the Court of Appeals for the Ninth Circuit could be

better and more accurately phrased by stating that certain of the plaintiffs in the *Multidistrict Vehicle Air Pollution* case and the petitioner did not assert claims for which relief is provided in the federal courts.

Conclusion.

For the foregoing reasons a writ of certiorari should not issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

GEORGE W. TACKABURY,
FRANK R. JOHNSTON,
Attorneys for Respondent.

NEWLIN, TACKABURY & JOHNSTON,
Of Counsel.